SUPREME COURT, U. S.
FILED
APR 6 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-1506

HARLAN #4 COAL COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John E. Jenkins, Jr.
JENKINS, SCHAUB &
FENSTERMAKER
704 4th Avenue
Huntington, West Viriginia 25716

Attorney for Petitioner.

COOK PRINTING CO., HUNTINGTON, W. VA.
44

TABLE OF CONTENTS

	Page
OPINIONS BELOW	3
JURISDICTION	4
QUESTION PRESENTED	4
STAUTE INVOLVED	4-5
STATEMENT	5
I. The Findings	5-6
II. The Board's Conclusion And Order	6, 7, 8
III. The Decision Of The Court Of Appeals	8
REASONS FOR GRANTING THE WRIT	8-25
APPENDIX	27.
Opinion Of The Court Of Appeals	1a-16a
N.L.R.B. Decision And Order	17a-27a

AUTHORITIES CITED

CASES:	PAGE
Bausch & Lomb, v. NLRB 1971 CCH Labor Relations Para. 12,150 (2nd Cir. 1971)	10, 22, 23
Carlisle Paper Box Company v. NLRB 398 F.2d 1 (3d Cir. 1968)	10
Continental Oil Co., 58 NLRB 169 (1944)	11, 15, 16, 18, 14a
Cross Co. v. NLRB, 286 F. 2d 799 (6th Cir. 1961)	19, 22, 23, 15a
Cross Baking Co. v. NLRB 453 F.2d 1346 (1st Cir. 1971)	24, 14a
Follett Corp. v. NLRB, 397 F.2d 91 (7th Cir. 1968)	10
Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968)	10, 11
Hollywood Ceramices Co., Inc., 140 NLRB 221 (1962)	9, 10, 11, 17, 11a, 13a
IBEW v. NLRB, 417 F. 2d 1144 (D. C. Cir. 1969)	11
S. H. Kress & Co. v. NLRB, 430 F.2d 1234 (5th Cir. 1970)	10

Table of Contents Continued

Page

NLRB v. Allen Mfg. Co.,
364 F.2d 814 (6th Cir. 1966) 19

NLRB v. Bata Shoe Co.,
377 F.2d 821, (4th Cir. 1967) 10, 22

NLRB v. Gold Spot Dairy, Inc.,
432 F.2d 125 (10th Cir. 1970) 11

NLRB v. Gorbea, Perez & Morell
328 F.2d 679 (1st Cir. 1964) 23

NLRB v. Lord Baltimore Press, Inc.,
370 F.2d 397 (8th Cir. 1966) 10

NLRB v. Louisville Chair Co.,
385 F.2d 922 (6th Cir. 1967) 10, 22, 11a

NLRB v. Maine Sugar Industries, Inc.,
425 F.2d 942 (1st Cir. 1970) 23

NLRB v. Millard Metal Service Center, Inc.,
82LRRM (1st Cir. 1973) 24

NLRB v. A. G. Pollard Co.,
393 F.2d 239 (1st Cir. 1968) 10

NLRB v. Southern Foods, Inc.,
434 F.2d 717 (5th Cir. 1970) 22

NLRB v. Tranchoa Chemical Corp.
303 F.2d 456 (1st Cir. 1962) 20

Radio Corporation of America,
102 NLRB 124 (1953) 13, 19, 14a

Seneca Knitting Mills, Inc.,
59 NLRB 754 (1944) 13, 18, 19, 14a

Tyler Pipe Industries, Inc. v. NLRB,
406 F2d 1272 (5th Cir. 1969) 22, 23

Universal Camera Corp. v. NLRB,
340 U. S. 474 (1951) 19, 20, 15a

Walled Lake Door Company v. NLRB,
472 F.2d 1010, 82 LRRM 2499 (5th Cir. 1973) . . 24

Wilson Athletic Goods Mfg. Co., Inc.,
73 NLRB 744 (1947) 16, 17, 18

STATUTES:

National Labor Relations Act, as amended
(61 Stat. 136, 73 Stat. 519)
29 U.S.C., Sec. 151 4

IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO.

HARLAN #4 COAL COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harlan #4 Coal Company, Petitioner herin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above- entitled case on January 10, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 490 F.2d 117. The opinion of the National Labor Relations Board is reported at 199 NLRB #15.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1974. The jurisdiction of this Court rests on 28 U. S. C. sec. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Act protects employees in the exercise of their right to determine questions of representation, in an election conducted by the National Labor Relations Board, from being subject to deliberately false information pertinent to a material issue which is calculated to influence dishonestly their voting decision.

STATUTE INVOLVED

Section 1 of the National Labor Relations Act (29 U. S. C. sec. 151) accords employees "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 7 of the Act restates the same principles with a further statement that employees "shall also have the right to refrain from any or all such activities . . ." To provide a procedure for implementing the rights of employees, Section 9 (c) (1) (B) further provides that "if the Board finds upon the record of such hearing that such a question of representation exists, it

shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

I. The Findings

In May of 1970, a majority of the employees of the Company (petitioner herein) voted against the United Mine Workers of America ("the Union") as their representative. Another election was held on September 23, 1971. The day before this election the employees received from the Union a letter containing a deliberately untrue representation on the critically important wage issue and the Union stationed two of its agents adjacent to the voting area where they could give the voters the impression of surveilance and checking off. A majority of the employees now voted for the Union.

On September 22, 1971, a letter from William J Turnblazer, the union's president, was received by the company employees who were to vote in the NLRB election scheduled for the next day.

Mr. Turnblazer represented the following to the employees.

> "Don't be mis-led (sic) by them coming to you now and saying that they are unable to pay the contract. You are aware that your wages are frozen by the action of President Nixon, but if you vote for the

> United Mineworkers of America, you can get the union contract wages and other conditions. We urge you to think about this for the benefit of yourself and your family."

This letter did not come to the attention of the company until after the election on September 23, 1971. Accordingly, the company had no opportunity to respond to it prior to the election. Subsequent to the election, which the union won by a vote of 43-16, the company filed objections wherein it alleged, *inter alia,* that the above-quoted statement in the union's election-eve letter constituted a material misrepresentation which warrented a reversal of the election result.

II. The Board's Conclusion and Order

In his Supplemental Decision and Certification of Representative, the NLRB Regional Director for Region 9 acknowledged that,

> "The employer could not, during the wage-price freeze, implement increased wage rates and/or related employee benefits, whether or not the employees voted to be represented by the (union) and were to be covered under the National Bituminous Wage Agreement."

The Regional Director concluded therefore that President Turnblazer's letter "could be subject to the

interpretation that if the employees vote for the (union), they would avoid the legal effect of the wage freeze." Nevertheless, the Regional Director declined to set aside the election. He stated that the employees were aware that no wage increases could be obtained unless the employer agreed to them in negotiation with the union and he cited Board cases permitting union campaign promises of wage increases which were dependent upon employer acquiescence at the bargaining table. Additionally, the Regional Director took

> "official notice of the fact that the Federal Government has publicized the wage-price freeze program and publicized telephone numbers which citizens can call concerning questions as to the effect of the wage-price freeze on specific matters.

The Regional Director also declined to place any weight upon eight identical employee affidavits which stated that:

> "I was led to believe that if this union won the election, I would receive at once the present union contract wages and other benefits, although other people's wages were frozen by President Nixon."

> "This letter did influence my vote and I make this statement on my own free will with no threats or promises from anyone."

The Board affirmed the Regional Director, refused to set aside the election, and ordered the company to bargin collectively with the union and perform other acts incidental to the foregoing 199 NLRB #15.

III. The Decision Of The Court Of Appeals

The Court of Appeals denied the petition of the company and granted enforcement of the order of the National Labor Relations Board. The Court admitted that the challenged letter was sent to employees at a time that prevented the company from effectively replying to it. Nevertheless, the Court upheld the decision of the Board on two grounds: first, that the letter was not susceptible only to the interpretation urged by the company, but instead was ambiguous and subject to several interpretations. Second, that information about the wage freeze was not within the "special knowledge" of the union but was, on the contrary, readily available to employees.

REASONS FOR GRANTING THE WRIT

Whether or not the National Labor Relations Act protects employees in the exercise of their rights from being influenced by deliberately false information in an election to determine their choice of a representative is an important and recurrent question which this Court should decide. The Congress has stated that "it is a purpose of The National

Labor Relations Act to prescribe the legitimate rights of both employees and employers in their relations effecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities effect commerce, to define and proscribe practices on the part of labor and management which effect commerce and are inimical to the general welfare. . . ." In short employees may not effectively carry out their rights provided under the Act if they are to be subjected to deliberately contrived false information, pertinent to material issues, which is disseminated to them on the eve of a representation collection.

The NLRB's standards for reviewing election campaign propaganda were set forth in the leading case of *Hollywood Ceramics Co., Inc.*, 140 NLRB 221, 223 (1962);

> "The basic policy underlying . . . rules in this election field is to assure the employees full and complete freedom of choice in selecting a bargaining representative. The Board seeks to maintain, as closely as possible, laboratory conditions for the exercise of this basic right of the employees. One of the factors which may so disturb these conditions as to interfere with the expres-

> sion of this free choice is gross misrepresentation about some material issue in the election. It is obvious that where employees cast their ballots upon the basis of a material misrepresentation such vote cannot reflect their uninhibited desires, and they have not exercised the kind of choice envisioned by the Act. For this reason, the Board has refused to certify election results where a party has misrepresented some material fact, within its special knowledge, so shortly before the election that the other party or parties do not have time to correct it, and the employees are not in a position to know the truth of the fact asserted."

The *Hollywood Ceramics* standard has been approved by every circuit court of appeals. *NLRB* v. *A. G. Pollard Co.*, 393 F. 2d 239, 241-43 (1st Cir. 1968); *Bausch & Lomb, Inc.* v. *NLRB*, 1971 CCH Labor Relations Para. 12,150 (2d Cir. 1971); *Carlisle Paper Box Company* v. *NLRB*, 398 F. 2d1, (3d Cir. 1968); *NLRB* v. *Bata Shoe Co.*, 377 F. 2d 821, 828-29 (4th Cir.) *cert. denied*, 389 U.S. 917 (1967); *S. H. Kress & Co.* v. *NLRB*, 430 F. 2d 1234, 1239 (5th Cir. 1970); *NLRB* v. *Louisville Chair Co.*, 385 F. 2d 922, 927 (6th Cir. 1967); *Follett Corp* v. *NLRB*, 397 F. 2d 91, 95 (7th Cir. 1968); *NLRB* v. *Lord Baltimore Press, Inc.*, 370 F. 2d 397, 401-02 (8th Cir. 1966); *Gallenkamp Stores Co.* v.

NLRB, 402 F. 2d 525, 533-35 (9th Cir. 1968); *NLRB* v. *Gold Spot Dairy, Inc.*, 432 F. 2d 125, 129 (10th Cir. 1970); *IBEW* v. *NLRB*, 417 F. 2d 1144, 1146-47 (D.C. Cir.), *cert. denied*, 396 U.S. 1004 (1969).

As the Regional Director acknowledged, there is no question in the instant case of the existance of a misrepresentation. There is also no dispute that a misrepresentation was made "so shortly before the election that the other party or parties (did) not have time to correct it". Rather, the Regional Director seems to have held either that the misrepresentation was not "material", or that it was not likely to have had a substantial effect on the election.*

Insofar as the Regional Director's ruling is based on lack of materiality or on the presumption that the employees had sufficient knowledge concerning the legal restrictions on their wages resulting from the wage-price freeze program, there is substantial NLRB precedent to the contrary. In *Continental Oil Co.*,

> "But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the cir-

---

* The Regional Director seems to have relied on the following additional language in *Hollywood Ceramics* (140 NLRB at 244):

> cumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have had a *de minimis* effect. Or it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion, Or, the Board may find that the employees possessed independent knowledge with which to eveluate the statements."

58 NLRB 169 (1944), the War Labor Board, which was responsible for stabilizing wages during World War II, informed the employer that it had approved a contract negotiated with the incumbent union prior to the filing of an election petition by an insurgent union, This information was communicated to the employees shortly before the election. In announcing its approval of the contract prior to the representation election, the War Labor Board violated its own labor regulations since approval should have been withheld pending the outcome of the election. Upon objections made by the insurgent union, the NLRB set aside the election. The NLRB stressed the difficulty in assessing the impact which this information would have upon the employees but indi-

cated its view that during a period when a stabilization program limited permissible increases, the communicating of misinformation concerning the permissibility of increases pursuant to such a program was bound to have great impact on the employees. The Board stated (58 NLRB at 172):

> "It is virtually impossible to ascertain the full effects upon the employees' free exercise of the right to select a collective bargaining representative of the War Labor Board's announcement just prior to the runoff election that it had approved the wage increase. In the present period of fixed wage ceilings, with resultant limitations imposed upon one of the most effective appeals which a labor organization can make to employees during an organiza tion campaign, namely, the promise of better wages, we conclude that the announcement of the Independent and the Company, prevented a free choice by the employees."

Accord, Seneca Knitting Mills, Inc., 59 NLRB 745, 756 (1944).

A similar situation arose in *Radio Corporation of America* 102 NLRB 124 (1954). Subsequent to the filing or an election petition by an insur-

gent union, the employer and the incumbent union negotiated an agreement which, pursuant to the then existing wage stabilization program, had to be submitted for approval of the Wage Stabilization Board. On the day prior to the election, the incumbent union informed the employees that the contract had been approved by the Wage Stabilization Board. This information had been obtained by the employer from the Stabilization Board's Regional Office. Later that same day, however, officials of the Wage Stabilization Board retracted the approval as inconsistent with its practice of not approving contracts where an election proceeding was pending befor the NLRB. Neither the employer nor the incumbent union made any effort to communicate the retraction to the employees. Once again, the NLRB set aside the election. The Board stated (102 NLRB at 126-27):

> "Clearly the precipitate announcement and the failure to take steps to clarify the actual status of the raise approval resulted in the election not being conducted in an atmosphere of free choice by the employees. Whatever the right to rebut election propaganda may be, it does not include the right to create a false impression that concrete benefits to employees have been secured, when, in fact, no such assurance can be given before the election takes place. . . . We think the conduct of

> the Employer and Intervenor was calculated to and did affect the results of the election.

These cases have application to the misrepresentation in President Turnblazer's letter. They constitute an acknowledgement by the NLRB of the likelihood that election results will be unduly affected by representations concerning the premissibility of certain wage increases under a wage stabilization program.* As the Board stated in *Continental Oil Co., supra,* a wage stabilization program limits employee wages and conesquently also limits the extent to which unions can employ the promise of better wages in their campaign propaganda. In the above-cited cases, the employees were in effect told that a vote for the incumbent union would insure previously negotiated wage increases notwithstanding the stabilization program and that, by contrast, a vote for the insurgent union would nullify the approved contract and perhaps cause the employees to lose the approved increase. Since the stabilization agencies were precluded from approving these contracts the information conveyed to the employees was misleading, and as the Board recognized, this information unduly affected the votes which they cast.

In the instant case, the employees were similarly misled. As in the earlier cases, the union incorrectly led the employees to believe that a vote for

the union would permit wage increases otherwise precluded by Phase 1 of the present Economic Stabilization Program.

Furthermore, as the above-cited NLRB cases show, employees cannot be expected to be in a position to evaluate the legal ramifications of a wage stabilization program. In *Continental Oil* and the cases following it, the NLRB was unwilling to assume that employees knew that contract approvals by the stabilization agencies were in violation of their own regulations. By analogy, the Regional Director erred in assuming that the employees' knowledge of the present Wage Stabilization Program was sufficiently sophisticated to warrent the conclusion that they would, as a matter of course, discount the claim that joining the union would make union contract rates available to them, notwithstanding the Phase 1 freeze.

In *Wilson Athletic Goods Mfg. Co.*, 73NLRB 744 (1947), *affirmed*, 164 F. 2d 637 (1947), the employer refused to bargain, notwithstanding the NLRB's certification of the unions subsequent to an NLRB election, because the union had promised employees that it would obtain a 30¢ hourly increase in wages if they won the NLRB election. The NLRB rejected the employer's defense to the refusal to bargain charge which was premised on

---

* Indeed, the stabilization agencies' own rules precluding approval of a contract during the pendency of an NLRB election proceeding constituted an explicit recognition of this principle.

the concluded fact that the hourly increase which the union had referred to disregarded lawful wage patterns established by the Wage Stabilization Board. The NLRB, affirmed by Court of Appeals for the Seventh Circuit, stated (73 NLRB at 745):

> "The Union's so-called promise of a 30-cent wage increase, even though such an increase might have been in excess of the then existing wage stabilization rates, constituted, at most, campaign propaganda which did not tend to impair the employees' freedom to select a bargaining representative. Moreover, as the Board stated in the *Maywood Hosiery* case 'Absent violence, we have never undertaken to police union organiza tion or union campaigns, to weight the truth or falsehood of official union utterances, or to curb the enthusiastic efforts of employee adherents to the union cause in winning others to their convictions'."

Several comments concerning the *Wilson* decision are in order. First, the far-reaching language used by the NLRB concerning its reluctance to police election campaigns and to weigh the truth or falsehood of union utterances is inconsistent with the more recent standards laid down by the Board and approved by the Courts in the *Hollywood Ceramics* case. It is doubtful that the Board would use such language today and it is clear that the

courts would not approve it. See the cases cited, *supra*, p.4, note *.

Secondly, the above-quoted holding was unnecessary to the decision of the case and hence is properly viewed as mere *dicta*. As the NLRB itself noted, the employer in the *Wilson* case did not object to the promise of a 30¢ hourly increase prior to the certification of the union as the bargaining representative. Hence, under the NLRB's rules, the employer was precluded from raising the question in the subsequent unfair labor practice proceeding. See 73 NLRB at 745, note 3. Third, as both the NLRB and the Seventh Circuit noted, the campaign literature which the employer objected to did not contain an unqualified assertion that a 30¢ per hour increase could be negotiated. Rather, the union in the *Wilson* case merely asserted that it would do its best to obtain such an increase. Finally, the challenged campaign propaganda in the *Wilson* case did not involve any directed assertions concerning the wage stabilization program then in effect. Unlike the instant situation, there was no direct claim that a vote for the union would provide a means of obtaining wages otherwise precluded by the stabilization program.

In sum, the *Wilson* case is distinguishable from the instant case and constitutes a precedent which the NLRB and the courts might well be reluctant to follow today. The disruption of the electoral process in *Continental Oil*, *Seneca Knitting*

Mills and *RCA, supra,* more nearly resembles the confusion created in employees' minds in the present situation. Those cases stand for the proposition that employees free choice is substantially affected by creating the erroneous impression that a vote for the union is a means of obtaining wage increases otherwise prohibited by a wage stabilization program. The Court of Appeals for the Sixth Circuit and the other circuit courts have shown themeslves to be willing to reverse NLRB conclusions concerning permissible campaign propaganda, especially where the misrepresentations are deliberate and are communicated to the employees on the eve of the election.

While the Court of Appeals for the Sixth Circuit has affirmed the NLRB's expertise in appraising election propaganda, *NLRB* v. *Allen Mfg. Co.*, 364 F. 2d 814 (6th Cir. 1966), it has also exhibited a willingness on other occasions to review those NLRB appraisals with a critical eye. The Court has stated that while the Board's judgments "are "entitled to great respect, evolved from wide experience, it is not infallible." *Cross Co.* v. *NLRB,* 286 F. 2d 799, 801 (6th Cir. 1961), *rehearing denied,* 288 F. 2d 188. In *Cross Co.*, the Court quoted from Justice Frankfurters' opinion in *Universal Camera Corp* v. *NLRB,* 340 U. S. 474 (1951), and concluded (286 F. 2d at 803):

> "The *Universal Camera* case, *supra, rec*ognizes that not all the Courts of Appeals

have accorded finality to the Board's decisions, an *where there has been recognizable falsity in election campaign statements, at a time when they were impossible of correction*, the Seventh and District of Columbia Circuit Courts of Appeals have not departed from more conventional standards. *Allis Chalmers Mfg. Co.*, v. *N.L.R.B.*, 7 Cir., 261 F. 2d 613; *Cleanse Corp. of America* v. *N.L.R.B.*, 7 Cir., 279 F. 2d 204; and *International Union of Electrical Radio and Machine Workers AFL-CIO* v. *N.L.R.B.*, D. C. Cir./__ F. 2d ____, and the Labor Board itself recognizes that there are limits to the Board's discretion. *Gummed Products Co.*, 112 N.L.R.B. 1092." (Emphasis supplied*

"A word about standards. We do not accept the Board's proposition that reversal of an electiton requires proof of 'arbitrary and capricious" action . . . The act provides that the employees shall have representatives of 'their own choosing.' 29 U.S.C. S 157. We do not think that the Board's view of what impairs freedom of choice is any more sacrosanct than its other fact-finding powers."

---

* Accord: *NLRB* v. *Tranchoa Chemical Corp.*, 303 F. 2d 456, 461 (1st Cir. 1962), where the court stated:

Following these cases, the Sixth Circuit rejected the NLRB's conclusion that misrepresentations contained in handbills distributed by the union on the morning of the election had an insubstantial effect on the outcome of that election. The court criticized the NLRB for not giving any weight to affidavits executed by employees who claimed that their votes were affected by the misrepresentations contained in the handbills (286 F. 2d at 801) and the Court concluded that it was

> "unable to follow the arguments of the Board that the misrepresentations of the union were fair, that they were mere propaganda, half truths and legitimate campaign representations. There should have been another election not subject to the infirmities here disclosed."

The court was equally adamant in rejecting the NLRB's petition for rehearing, stating (288 F 2d at 189):

> "There was no denial that the misstatements were made, no denial that they were false and the defense of them as legitimate election propaganda by the barganing agent at the time they were made establishes their importance as a contributing factor in determining the outcome of the election. In political elec-

> tions, this is called a 'roorback'. It is obvious that the purpose of the falsity was to unfairly control the result of the election."

The cases in the Sixth and other circuits involving review of NLRB findings concerning pre-election union misrepresentations stress two factors—whether the misrepresentations were deliberately false and whether the employer had an opportunity to rebut the misrepresentations. In *NLRB* v. *Louisville Chair Co.*, 385 F. 2d 922, 927 (6th Cir. 1967), the Court distinguished *Cross Co. supra*, on the ground that the misrepresentation challenged by the employer

> "was not disseminated at a time or in a manner calculated to deprive the (employer) of an opportunity to reply."*

Other recent court cases stressing the opportunity, or lack thereof, to rebut misrepresentations as an important factor include *NLRB* v. *Bata Shoe Co.*, 377 F. 2d 821 (4th Cir. 1967); *Tyler Pipe Industries, Inc.* v. NLRB, 406 F. 2d 1272 (5th Cir. 1969), opinion reversing NLRB's decision on remand, 447 F. 2d 1136 (1971) (per Judge O'Sullivan sitting by designation): *NLRB* v. *Southern Foods, Inc.*, 434 F. 2d 717 (5th Cir. 1970); *Bausch & Lomb, Inc.* v. NLRB, 4 CCH Lab. Cas. 1971,|| 12,150 at p. 22,587 (2d Cir.), decided October 22, 1971.

There are also several cases in which the courts have disagreed with the NLRB's conclusion concerning the likely impact of union misrepresentations upon the employees where the misrepresentations were deliberate. As previously noted, the Sixth

> "Having deliberately by-passed its opportunity to reply the (employer) cannot now contend that the union campaign material, which was refutable, prevented the exercise of a free choice by its employees in the election of their bargaining representative." 385 F.2d at 927.

Circuit referred to this factor in denying the NLRB's petition for rehearing in *Cross Co., supra.* In addition, in *NLRB* v. *Gorbea, Perez & Morell,* 328 F.2d 679, 682 (1st Cir. 1964), the court stated:

> "We think the better expert on what persuasion is needed by persons sought to be induced is the knowledgeable party who offers consciously false inducements."

Accord: NLRB v. *Marine Sugar Industries, Inc,* 425 F. 2d 942 (1st Cir. 1970); *Bausch & Lomb, Inc.* v. *NLRB, supra; Tyler Pipe Industries, Inc.* v. *NLRB, supra.*

---

* The Court's opinion reveals that the challenged misrepresentation was made approximately two weeks prior to the election and the court ruled:

In *Cross Baking Co.* v. *NLRB*, *453* F.2d *1346*, 78 LRRM 3059 (1st Cir.), decided December 2, 1971, the Court set aside an election where the union made deliberate election-eve misrepresentations. The Court used the following language (78 LRRM at 3061):

> "Eleventh hour misrepresentations, manifestly deliberately untrue, have obviously been carefully timed to obtain the utmost benefit of the untruth, and presumably have been phrased to go just far enough to meet what the misrepresenting party believes to be necessary. We suggest that there should be an affirmative burden upon that party, accordingly, to disprove materiality."

In *NLRB* v. *Millard Metal Service Center, Inc.*, 82 LRRM 2345 (1st Cir. 1973) the Court again reaffirmed its holding that elections must be set aside when the Union circulates deliberate falsehoods just before the election occurs. In *Walled Lake Door Company* v. *NLRB*, 472F.2nd 1010, 82 LRRM 2499 (5th Cir. 1973) the Court also overruled the NLRB and held that an election and a resulting certification were invalid where the Union sent a campaign letter with a clear misstatement of fact immediately prior to the election.

In the instant situation, the claim that a vote for the Union would permit an increase during the freeze

to the level of wages provided for in the Union's contract was so palpably contrary to the rulings of the Cost of Living Council and the Office of Emergency Preparedness that the claim must be considered to have been deliberately false. Moreover, it was couched in terms which made it more likely to have a substantial impact on the employees since they were urged to "think about this for the benefit of yourselves and your family". Finally, the misrepresentation was advanced for the first time on the eve of the election when the company had no opportunity to offer a rebuttal.

The petition should be granted.

Respectfully Submitted,

JOHN E. JENKINS, JR.

JENKINS, SCHAUB AND FENSTERMAKER

Attorneys

Harlan #4 Coal Company

April, 1974